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JUL 01 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NICOLAS ALLEN BAINARD, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF CHELAN COUNTY

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

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A. STATEMENT OF THE CASE

The State charged Nicolas Bainard with two counts of first degree murder and one count of first degree arson. (CP 240-242, 283-285, 339-340) The second amended information alleged that in the commission of the murder charges the defendant was armed with a deadly weapon, *citing* RCW 9.94A.533 and .602. (CP 240-41)

The court gave a special verdict instruction:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in count I. A person is armed with a deadly weapon if, at the time of the commission of the crime, the deadly weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there is a connection among the defendant, the crime, and the deadly weapon.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

(CP 166-67)

The jury returned guilty verdicts on two counts of second degree murder and one count of arson, and special verdicts finding Nicolas was armed with a deadly weapon at the time of the commission of the two murder counts. (CP 129-31, 134-35) The defense challenged the sufficiency of the jury instructions and verdict to support sentencing enhancements based on possession of a firearm or deadly weapon.

(CP 73-74) The court found the verdicts were sufficient to support firearm enhancements of five years on each of the two murder counts. (CP 37)

The State recommended standard range sentences of 160 months and 165 months on the second degree murder convictions plus two 60 month firearm enhancements. (RP 999-1000) The court imposed a sentence of 450 months confinement, including the two consecutive 60-month firearms enhancements. (RP 1029; CP 25-34)

In this appeal, Mr. Bainard initially challenged the firearms enhancements, contending that the special verdict instruction did not require the jury to find that he was armed with a firearm, and thus was insufficient to support the enhancements. (App. Br. 6-8)

After Mr. Bainard filed his opening brief, the Washington Supreme Court reversed a firearm enhancement in *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005). The court held that a special verdict instruction that asked the jury to determine whether a defendant was armed with a deadly weapon was insufficient to support imposition of a firearm enhancement. This court stayed the present case pending the mandate in *Recuenco*.

The Supreme Court granted *certiorari* and reversed, holding that while the instruction was insufficient, the error could be harmless. *Washington v. Recuenco*, 548 U.S. 212, 220, 126 S. Ct. 2546,

165 L. Ed. 2d 466 (2006). On remand, the Washington Supreme Court affirmed its prior decision, holding that in light of the notice requirements and right to a jury trial, guaranteed by Washington State's Const. art. I, § 21, an information that contained a deadly weapon allegation did not charge an offense that included a firearm enhancement, and therefore only the deadly weapon enhancement could be imposed. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).

The mandate having issued in *Recuenco*, this court requested additional briefing in the instant case.

B. ARGUMENT

1. IMPOSITION OF FIREARM SENTENCE ENHANCEMENTS VIOLATED WASHINGTON'S CONSTITUTION.

"An accused has a constitutional right to be informed of the criminal charge against him, so he will be able to prepare and mount a defense at trial." *Recuenco*, 163 Wn.2d at 440, citing *State v. McCarty*, 140 Wn. 2d 420, 998 P. 2d 296 (2000) Const. art I § 21 provides greater protection for jury trials than does the federal constitution. *State v. Recuenco*, 163 Wn.2d at 440. Accordingly, under the Washington constitution, a criminal defendant has "the right to have a jury determine beyond a reasonable doubt if he was guilty of the crime and sentence enhancement charged." *Id.*

Here, as in *Recuenco*, the State only charged Mr. Bainard with being armed with a deadly weapon, not with a firearm. The failure to allege the use of a firearm precludes imposition of the firearm enhancement.

Moreover, the jury was never instructed that it was to determine whether Mr. Bainard was armed with a firearm. The "deadly weapon" instruction permitted, but did not require the jury to predicate the deadly weapon finding on the use of a firearm.

As construed by *Recuenco*, 163 Wn. 2d 428, Washington's constitution prohibits imposition of a firearm enhancement under these circumstances.

2. THE SPECIAL VERDICT INSTRUCTION ERRONEOUSLY INCLUDED FIREARMS IN THE DEFINITION OF DEADLY WEAPON

The *Recuenco* decision acknowledged that a properly instructed jury could return a special verdict supporting a properly charged weapons enhancement. 163 Wn. 2d 438-39. The opinion recognized that since 1995, Washington statutes have distinguished between the deadly weapon and firearm enhancements. *Id* at 438. "The Hard Time Act "split the previous deadly weapon enhancement into separate enhancements for

firearms and for other deadly weapons.'" *Id. quoting State v. Brown*, 139 Wn.2d 20, 25, 983 P.2d 608 (1999).

The court cited pattern instruction for a special verdict for use of a firearm:

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime [*in Count _____*].

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant [*or an accomplice*]. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

[If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.]

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

11 WPIC 2.10.01.

The court did not address the issue presented in this case, namely, whether a deadly weapon enhancement may be based on a jury finding under an instruction that permits the jury to find the defendant was armed with a deadly weapon if he was armed with a firearm. But here, the jury

instruction expressly authorized the jury to find that the defendant was armed with a deadly weapon if he was armed with a firearm: "A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded." (CP 167)

The instruction was incorrect because RCW 9.94A.533 defines a deadly weapon as a weapon *other than a firearm*:

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon *other than a firearm* . . . If the offender or an accomplice was armed with a deadly weapon *other than a firearm* . . the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

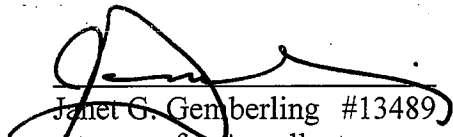
RCW 9.94A.533(4) (emphasis added). There is no evidence Mr. Bainard was armed with any deadly weapon other than a firearm at the time of the offenses. Thus, unlike the *Recuenco* case, this matter should not be remanded for imposition of the deadly weapon enhancement. The enhancement should simply be vacated.

C. CONCLUSION

The State failed to charge Mr. Bainard with being armed with a firearm; the firearm enhancement must be reversed. The special verdict form for the deadly weapon enhancement permitted the jury to find Mr. Bainard was armed with a deadly weapon based on his use of a firearm, a weapon which is expressly excluded from the definition of deadly weapon. The matter cannot be remanded for imposition of a deadly weapon enhancement based on the special verdict.

Dated this 30th day of June, 2008.

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